No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and THE NATIONAL SURETY COMPANY (a corporation),

Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

PERNAU-WALSH PRINTING CO.

Synopsis.

Cases Cited.

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I. Statement of the Case.

A. THE FACTS.

The facts appear in the pleadings and stipulations on file.

In 1911 California-Atlantic Steamship Company maintained a service as common carrier of merchandise

between the Pacific and Atlantic coasts, by way of the Panama Canal, operating a number of chartered vessels in said service. On April 18, 1911, this Steamship Company made a contract with libelant, agreeing to use oil as fuel, and to purchase from libelant all the oil required, in the operation of steamers then under charter and of all other steamers which it should thereafter charter for said service, and libelant agreed reciprocally to sell and deliver to the said charterers the oil so required by them (17-18).

Between April 18, 1911, and August 28, 1911, a representative of libelant informed a representative of the Steamship Company verbally that thereafter it would be necessary to charge any oil furnished to the vessels mentioned in said contract to the vessels, to which the representative of the charterer consented.

On August 28, 1911, the Steamship Company chartered the steamship *"Portland"*, under a time charter in government form. The charter-party, in conformity with the oil agreement between libelant and charterer, required the owners of the steamship to convert her into an oil burner (47). She was so converted, and thereafter oil was furnished by libelant to the *"Portland"* under the agreement of April 18, 1911, with the charterer; the bills delivered to the charterer were made out, as follows: "S. S. Portland and Charterer to Union Oil Company of California, Dr.," and all the bills for oil so furnished to the charterer between August 28, 1911, and July 5, 1912, were presented to and paid by California-Atlantic Steamship Company, charterer.

During this period libelant knew that the *"Portland"* was under time charter and knew, from the fact that charterer was purchasing the oil for the *"Portland"* under its oil agreement, that the *"Portland"* charter was not within the class of charters excepted in the oil agreement, but that the charterer, by its contract with the owner of the vessel, was obligated to procure and pay for the oil.

Between July 5, 1912, and November 27, 1912, libelant made five deliveries under its contract, for which it could not collect its bills from the charterer. The first two defaults in payment occurred in July; in spite of these defaults libelant made two further deliveries in August, for which the charterer again defaulted. In spite of these four defaults a further delivery was made three months after the fourth default, on November 27, 1912.

After failing to collect the payment for the five deliveries of oil from the charterer, libelant finally, on January 29, 1913, filed a libel in rem against the vessel.

B. THE QUESTION INVOLVED.

Libelant contends: That it has a maritime lien upon the steamer *"Portland"* for the oil furnished.

Claimant contends: That libelant has no lien upon the steamer, and that neither the steamer nor her owners are liable for the oil furnished.

C. ERROR RELIED UPON BY APPELLANT.

That the district court decreed that the steamer and her *owners are liable* for the value of the oil furnished.

II. Brief of the Argument.

FIRST. LIBELANT HAS NOT SHOWN THAT THE OIL WAS PROCURED BY THE OWNER OR A PERSON AUTHORIZED BY THE OWNER TO PROCURE IT. THE FACTS SHOW, ON THE CONTRARY, THAT THE OIL WAS PROCURED BY THE TIME CHARTERER, UNDER A PERSONAL CONTRACT OBLIGATING LIBELANT TO FURNISH THE SAME.

1. Libelant, claiming a lien against the steamship *"Portland"* under the Act of June 23, 1910, has the burden of proving that the oil was procured by the owner of the vessel or by a person authorized by the owner.

The vessel was under time charter. The owner, under this contract, received his hire, whether the charterer chose to use her in navigation or to lay her up for lack of fuel. *The owner was, therefore, not interested in her fuel supply.* The charterer was obligated to *provide* for all the fuel that she might require, and to pay for the same (48).

2. To provide for the fuel oil for this vessel, and the other vessels of its line, the charterer had made a general oil contract with libelant, whereby the charterer was obligated to purchase all its oil for this vessel from libelant, and libelant was obligated to sell and deliver to charterer all the oil required in her operation (18).

The oil was, therefore, actually furnished to the "*Portland*" by the libelant upon the procurement of the charterer, and not of the owner.

3. The libel alleges that the oil was "furnished by order of the master and charterer"; the answer denies that the oil was furnished by order of the master. The stipulation reads that the oil was furnished "upon orders *from* the master". It appears, therefore, that the oil in suit was furnished to the vessel "by order of the charterer, upon orders from the master".

It is also stipulated that the oil "was furnished *under the conditions* specified" in the oil contract between libelant and charterer (20); it follows that it was furnished *to the party to said contract,* viz., *the charterer.* The proof, therefore, shows that the oil was furnished *to the charterer, under the oil agreement,* "upon orders from the master". The orders came, of course, in any specific case, "from the master"; for he determined, under the charter-party, the amount of oil necessary for the voyage designated by the charterer. In this sense the oil furnished by libelant to the charterer, under contract, was based "upon orders from the master"; but it was *procured* from the furnisher by the charterer under its general blanket contract.

4. The oil having been procured by the charterer, in accordance with its obligations both to the owner of the vessel under the charter-party, and to libelant under the previous general oil contract, it follows that the oil was *not* procured by either the owner or a person authorized by the owner. The charterer had no actual

authority from the owner; nor does the statute give to the charterer presumed authority to bind the owner or the vessel.

The charter-party gave the charterer no right to impose a lien upon the vessel for fuel to be furnished to her; for, in the first place, the charter obligation to provide the fuel was upon the charterer, and, in the second place, the only lien upon the vessel given to the charterer by the charter-party was a lien for moneys advanced and not earned (Clause 19 of Charter-party, Apostles p. 52).

5. Nor had libelant a right to presume that the person ordering the oil had authority to bind the vessel for the supplies. On the contrary, libelant knew (I) that the *"Portland"* was under time charter and used by charterer in a regular line of steamships; (II) that her owner was not interested in her navigation or fuel supply; (III) that the charterer was obliged, under the charter-party, to procure the oil and to pay for it; (IV) that the charterer had accordingly made a contract with libelant for such supply; (V) that under this contract supplies had been ordered and paid by the charterer for many months; (VI) that if, under this contract, the charterer should be in default in payments for oil, the libelant had easy and certain remedies agreed upon between libelant and charterer, whereby it could protect itself against every one of the losses subsequent to the first default, or practically against all loss.

The furnisher knew that, because of the terms of the charter-party, and for other reasons, the person ordering the supplies was without authority to bind the vessel; and knew that, because of the terms of the general oil agreement with the charterer, the person ordering oil for the *"Portland"* was ordering it for the charterer personally.

6. If libelant did not actually know all these circumstances, it could easily have ascertained each and every one of them. Knowing that it was dealing with a charterer, it was put upon inquiry as to the terms of the charter and was bound thereby. The charterer, and the terms of the charter-party, were within easy reach of libelant; if the oil contract with the charterer, and the fact that the charterer purchased and paid for the oil under it were not sufficient notice to the libelant, it could have ascertained by asking the charterer, that the charter-party required the charterer to pay for the oil furnished to the *"Portland"*.

Curacao Trading Co. v. Bjorge, 263 Fed. 693 (March, 1920);
The Oceana, 233 Fed. 139; affirmed 244 Fed. 80;
The Hatteras, 255 Fed. 518;
The Penn, 266 Fed. 933 (July, 1920);
The Castor, 267 Fed. 608 (July, 1920).

In *Curacao Trading Co. v. Bjorge,* 263 Fed. 693, the Circuit Court of Appeals for the Fifth Circuit held that

> "A steamship, under time charter requiring charterers to furnish and pay for coal, and *containing no provision respecting their subjecting the vessel to liens*, is *not* subject to lien under Act June 23,

1920, for coal furnished in a foreign port on the order and credit of charterer under a prior contract with the furnisher.

In *The Oceana,* 233 Fed. 139, it is held that

> "The phrase 'knew, or by the exercise of reasonable diligence could have ascertained' * * * was used in the Act of Congress to make it clear that, *if the furnisher knew of the existence of a charter-party, * * * he is put upon inquiry as to its terms,* and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer * * * had undertaken to furnish the vessel at his own cost."

In *The Castor,* 267 Fed. 608 (July, 1920), it is likewise held that

> Where the person supplying necessaries *has knowledge that he is dealing with a charterer,* he is put upon inquiry as to the terms of the charter.

In *The Penn,* 266 Fed. 933, the District Court says:

> "It does appear, however, that Mr. Guy, the superintendent of the libelant company, knew that the vessel was chartered by a company that was running a line * * * The knowledge on the part of Mr. Guy was sufficient to put the libelant on inquiry as to the existence and to the terms of the charter-party, but the libelant failed to make any inquiry and * * * supplied the material without any inquiry whatever. Having, therefore, been put upon inquiry and failing to make the necessary inquiries, the libelant did not acquire a lien against the vessel."

See, also, *The Mary A. Tryon,* 93 Fed. 220.

In the instant case libelant had been dealing with the charterer before it had any dealings with the *"Port-*

land'' and had a contract with the charterer whereby the latter was bound to purchase its oil requirements for the *''Portland''* from the libelant and to make payment in the agreed terms; under this contract libelant had dealt with the charterer and had furnished oil to the *''Portland''* for many months and had been paid therefor by the charterer. All these dealings were profitably carried on, on the personal credit of the charterer, at the prices and under the conditions of the oil agreement between charterer and libelant.

Assuming that the master did place the orders for the oil requirements directly into the hands of the libelant, which does not appear as a fact, the libelant knew that the order referred to, and was placed under, the oil contract which libelant had made with the charterer, and libelant, in accepting the order, looked to the charterer for the payment of the oil; in other words, the master acted in the transaction as the charterer's agent, and libelant so understood. The charterer having no authority to bind the vessel, its agent had no such authority.

When the charterer bound itself, in its contract with libelant, ''to purchase from libelant all oil required in the operation'' of the *''Portland'',* the charterer legally ''procured'' all oil so required; and the libelant thereby contracted to furnish all the oil required in the operation of the steamship upon the order of the charterer. The real order for all oil to be furnished to the *''Portland''* was the *orders of the charterer,* as a party to the oil contract; it is a stipulated fact that all the oil in fact furnished to her was furnished under the

conditions of said contract. It follows that the oil in suit was furnished to the charterer *upon the order of the charterer,* under the conditions of the contract and in pursuance of libelant's legal obligations to the charterer. Assuming, without granting, that the specific "orders from the master", upon which the five installments were furnished by libelant, were transmitted to libelant directly by the master, they were nevertheless mere items of the general order of the charterer, whereby the charterer procured all the oil required by the *"Portland"* under the oil contract.

Under clause 10 of the charter-party the master was "under the order and direction of the charterer"; under clause 13 he was made the responsible agent of the charterer with regard to consumption of fuel oil. *If* he told libelant directly how many barrels of fuel oil were required at stated times, he did so under the directions of the charterer, and as the charterer's agent. The libelant knew that the master, when he so ordered supplies, acted under the oil agreement with the charterer, and as the agent of the charterer. In the absence of any other facts, this knowledge prevents the operation of the presumption that the master had authority from the owner to procure the oil; for the latter presumption applies only in the absence of knowledge by the furnisher that the master is in fact acting as the agent for the charterer.

In addition to this the lien given by the Act is subject to the exception that no lien shall be conferred where "the furnisher knew, or by the exercise of reasonable diligence could have ascertained" that the person order-

ing was without authority to bind the vessel therefor. Now the facts show that the libelant knew, or by the exercise of reasonable diligence could have ascertained, that the charter-party required the *charterer* to pay for the fuel oil needed. The libelant had habitual experience with this time charterer; indeed "it is usual and customary for the charterer * * * to disburse the necessary expenses of the ship, and of this *all persons furnishing supplies, etc., to a chartered ship* must be deemed to have notice". (This Court, in *The South Coast,* 247 Fed. 84, *89.)* And again the fact that the orders for the oil were placed on behalf of the *"Portland",* chartered by California Atlantic S. S. Co., was notice to the libelant that this vessel was under a charter bringing her within the necessary scope of the general oil agreement with the charterer, and imposing upon the charterer the duty to pay for the oil.

SECOND. DISTINCTION BETWEEN THE "SOUTH COAST" AND THE INSTANT CASE.

1. In the case of the *"South Coast",* 233 Fed. 327; 247 Fed. 84; 251 U. S. 519, upon which libelant has relied in the lower court, the *charter-party recognized that liens might be imposed by the charterer:*

> "By reason of the provision that the charterer will hold the owner harmless from all liens against the vessel there is an implication of authority on the part of the *charterer* to incur such expenses on the credit of the vessel." (247 Fed. *89.*)
>
> "The charter-party recognizes that liens may be imposed by the charterer and allowed to stand for

> less than a month, and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law." (251 U. S. *523.*)

In the instant case the charter-party does not recognize that liens might be imposed by the charterer for fuel oil furnished; on the contrary, the charter-party provides:

First. That the charterer shall provide and pay for all the fuel.

Second. That the charterer shall pay for the use of the vessel $225 per running day, commencing on the day of her delivery to the charterer and continuing until her delivery back to the owners, regardless of whether the vessel moves or not, or whether she is supplied with fuel oil, or not.

Third. That the charterer can create only one lien, viz., "a lien on the ship for all moneys paid in advance and not earned". These provisions in the charter-party negative the right of the charterer to impose any lien upon the vessel for the purpose of procuring fuel oil for its business.

See *Curacao Trading Co. v. Bjorge, supra,* where the Circuit Court of Appeals for the Fifth Circuit said, referring to the *"South Coast"*:

> "The case cited is not authority for the proposition that a vessel may be subjected to a lien for the price or value of supplies furnished to a charterer who is without authority to bind the vessel or its owner therefor."

2. In the *"South Coast"* case the charterers ordering the supplies were actually the owners of the vessel *pro hac vice* and had possession and full control of the vessel; hence an order from such charterers was equivalent to an order from the owner. In the instant case the charterer ordering the oil under its standing contract had *not* possession of the vessel (as libelant knew), and therefore had no presumptive right to pledge the vessel for the payment of the charterer's debts.

3. In the instant case the oil was furnished by libelant to the *"Portland"* under a standing contract with a well-known charterer, who ran an extensive line of steamships between Atlantic and Pacific ports, by the terms of which all the steamers of the charterer's line were supplied with fuel oil by the libelant in reliance upon the personal credit of the charterer for reimbursement for the deliveries made to the various steamers, whereas, in the *"South Coast"* case, there was no contract between the furnisher and the obscure charterers, but the furnishers, in voluntarily making the casual supplies, relied upon the credit of the vessel.

THIRD. THE ALLEGED AGREEMENT BETWEEN MR. KEOWN AND MR. CHESEBROUGH.

After the oil contract had been made between libelant and charterer, and before the *"Portland"* was added by the charterer to its fleet of chartered steamers, Mr. Keown, representing the libelant, told Mr.

Chesebrough, representing the charterer, that thereafter it would be necessary "to charge any oil and dunnage furnished to the vessel mentioned" in the contract "to the vessels. Mr. Chesebrough consented thereto".

Libelant relies upon these facts for the purpose of supporting its alleged lien upon the "*Portland*".

Assuming that the conversation with Mr. Chesebrough was a sufficient consent of the charterer, it is respectfully submitted that this alleged agreement had no binding force even as against the charterer, much less against the owner, for the following reasons:

(I) Such an agreement, to be binding, must be in writing. Libelant claims its efficiency during a period beginning at the date of conversation and continuing to November 27, 1912,—a period of considerably more than one year. Not being in writing, the agreement is invalid as between the parties thereto (Civil Code of California, par. 1624, subd. 1).

(II) The alleged agreement is without consideration: Under the previous written contract libelant was obligated to sell to the charterer all the oil required in the operation of its steamers, on its personal credit. Libelant had no right to impose new conditions upon the charterer. Libelant's promise to carry out the subsisting contract with the charterer, or the performance by libelant of its contractual duty to furnish considerateerer's vessels with oil, was not a sufficient consideration to support the charterer's consent or promise that libelant should, in the future, have a lien upon the ves-

sels. Mr. Chesebrough had no power to alter the original contract by verbal consent, and no authority to waive any rights thereunder. This phase of the case comes clearly within the principle of the case of *Alaska Packers' Ass'n. v. Domenico,* 117 Fed. 99, decided by this court: For this reason it follows that the attempted agreement was invalid, even as between libelant and charterer.

(III) Assuming that the agreement was valid as between libelant and the charterer, it was not binding upon the owner of the vessel. The owner was not represented at the making of the alleged agreement. The owner had chartered his vessel to a charterer who was bound to provide and pay for the fuel oil, and who, as obligated, paid to libelant for all the fuel supplies furnished during ten months. The charterer had not possession of the vessel, nor any right to bind the vessel, and the libelant knew this. The Act provides what persons may bind the vessel by procuring repairs; the charterer of the vessel is not among these persons, even presumptively. Mr. Chesebrough was, therefore, not authorized, either expressly or presumptively, to consent, on behalf of the owner, to what Mr. Keown told him (assuming that a conversation between these two persons would be otherwise binding upon the charterer). Mr. Chesebrough was not the owner of the vessel, nor a person authorized by the owner to order fuel oil; on the contrary, he was forbidden by the charter-party from charging the owner or the vessel with the fuel oil. Nor was he one of the persons presumed, under the Act, to have authority from the owner. Mr.

Keown, in dealing with Mr. Chesebrough, knew that the California Atlantic Steamship Company had a contract with his Oil Company, and had been furnished oil under it on its personal credit; when he told Mr. Chesebrough that it would be necessary thereafter to charge the oil to the owner, he had no right to presume that he was dealing with the owner of the vessel or any person authorized by the owner, but was bound to presume that the time charterer of a vessel has no authority whatever to bind the owner to the agreement which he apparently proposed to Mr. Chesebrough. He did not even take the trouble of inquiring for the terms of the charter-party. If libelant had really in good faith decided to furnish oil to this charterer in the future only on condition that it should have a lien on the vessel for the supply, common prudence, and indeed common fairness, should have suggested that it would deal with the owner or some person representing the owner, in the matter of supplies to the vessel; besides, after the charterer's first default in July, the dictates of honesty and good conscience would have required that libelant should promptly inform the owner of charterer's default, instead of continuing to do business with the charterer for months and to furnish more and more supplies, accumulating more and more defaults and secretly running up bills against the innocent owner.

That libelant did not rely upon the alleged agreement with Mr. Chesebrough, and did not thereafter make deliveries in reliance upon the lien which it attempted to create, is also apparent from the fact that the September, October and November deliveries (ex-

cept the one of November 27) are not attempted to be charged to the vessel, but were apparently paid by the charterer.

The last two deliveries, made on August 31 and November 27, were both made after libelant's contractual right to cancel the contract of April 18 had accrued. The price charged for these supplies is the sum of $3172.65. Oil of this value was furnished by libelant after at least three defaults by the charterer. Before furnishing it, libelant had, under its contract, the right to refuse to furnish any further oil at all, or, before furnishing it, to require prepayment by charterer. Libelant waived these rights deliberately, not being able to resist the temptation to speculate upon the chance of mulcting the vessel in case of default by the purchaser.

It is submitted that every principle of equity forbids libelant from imposing this debt of the California-Atlantic Steamship Company, speculatively, rashly and unnecessarily incurred by the Oil Company, upon the innocent owner of the vessel, who did not order the oil, who did not need it for his charter contract, who had nothing to gain by the furnishing of it and had nothing to lose by the lack of it.

After having made many deliveries to the charterer on its personal credit, under a contract binding upon both libelant and charterer, libelant could not acquire a maritime lien upon the vessel by simply informing the charterer that it would thereafter charge the oil to the vessel, without inquiring from the charterer what its

relations were to the vessel with reference to a right to consent to a lien. The circumstances attending the transaction certainly put the libelant on inquiry as to the terms of the charter-party, of the existence of which it was informed, and as to the charterer's right to pledge the vessel to the performance of a contract which libelant had made with the charterer without any reference to this vessel, and before the charterer had any relation whatever to her. "No one with knowledge that supplies were ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking." (The *Yankee,* 233 Fed. 919, *926.*)

Stripped of non-essentials, the instant case resolves itself to the following propositions:

1. To give libelant a lien, it must show that the oil was furnished "upon the order of the owner, or of a person by him authorized".
2. The oil was in fact furnished under the conditions of a general agreement with the charterer, whereby the charterer was obligated to purchase the oil, and libelant was obligated to sell and deliver the oil at places specified; in other words, it was furnished by libelant in performance of its contractual obligation to charterer, upon the latter's orders.
3. The charterer was *not* a person either authorized by the owner in fact, or authorized presumptively under the Act of Congress.

4. Hence libelant has no lien upon the vessel.

The decree of the District Court should be reversed, with instructions to dismiss the libel with costs to appellant in both courts.

Dated, San Francisco,
February 10, 1921.

Respectfully submitted,

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LOUIS T. HENGSTLER,
Proctors for Appellants.